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No. 80-2027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER L. BOYD,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was deprived of any right of confrontation at his State trial on charges of murder and attempted armed robbery, where the testimony of a prosecution witness relating the statement of a second offender (who died before trial) was used to prove merely that the statement had been made and where the prosecution clearly informed the jury that the content of the statement was not trustworthy.

2. Whether any violation of the petitioner's right to confront witnesses against him that might have occurred as a result of admission into evidence of a co-offender's statement, was harmless error where the properly admitted evidence of the petitioner's guilt (including his own incriminating statement) was so overwhelming that the jury's verdicts would not have differed.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINION BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 2
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 9

I.

The Petitioner Was Not Deprived Of His Right To Confront Witnesses Against Him At His Trial Where The Testimony Of A Prosecution Witness Relating The Statement Of A Co-Offender (Who Died Before Trial) Was Admitted Only To Show That The Statement Had Been Made, Where The Jury Was Afforded A Satisfactory Basis For Evaluating The Truth Of The Statement, And Where The Prosecution Informed The Jury That The Statement Was Not Trustworthy 9

II.

Any Violation Of The Petitioner's Right To Confront The Witnesses Against Him Resulting From Admission At Trial Of Holiday's Statement Was Totally Harmless Where The

Petitioner Admitted Participating In The Attempted Armed Robberies, Where That Admission Was Tantamount To An Admission To Murder Under The Illinois Felony-Murder Rule, And Where Other Properly Admitted Evidence Also Established His Guilt Beyond Any Reasonable Doubt 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Bruton v. United States, 391 U.S. 123 (1968) ... 11
California v. Green, 399 U.S. 149 (1970) 11
Dutton v. Evans, 400 U.S. 74 (1970) 11, 14
Harrington v. California, 395 U.S. 250 (1969) 13
Parker v. Randolph, 442 U.S. 62 (1979) 13
People v. Smith, 56 Ill. 2d 328, 307 N.E.2d 353 (1974) 13
Schneble v. Florida, 405 U.S. 427 (1972) 13

Statutes

Ill. Rev. Stat. 1975, ch. 38, pars. 9-1(a)(3), 5-2(b), 5-2(c) 12, 13

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, affirming the petitioner's convictions for three counts of murder and three counts of attempted armed robbery, is reported as *People v. Walter L. Boyd*, 88 Ill. App. 3d 825, 410 N.E.2d 931 (1st Dist. 1980).

JURISDICTION

The Petition for Writ of Certiorari does not state any statutory provision on which the jurisdiction of this Court is invoked. Further, as treated more fully within the following argument, the respondent believes that the petitioner has failed to show any good reason for this Court to exercise jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

After a state jury trial in the Circuit Court of Cook County, Illinois the petitioner, Walter L. Boyd, was convicted of three counts of murder and three counts of attempted armed robbery. (R. 1658)[1] He was sentenced to three terms of 100 to 300 years in the state penitentiary for the three murders and three terms of 3 to 15 years for the attempted armed robberies. (R. 1779-1780) The petitioner appealed from the judgments of conviction and the sentences to the Appellate Court of Illinois, First District. The Appellate Court affirmed the petitioner's convictions and sentences. His petition for leave to appeal to the Supreme Court of Illinois was denied.

[1] R. designates the transcript of record of the petitioner's trial; R.C designates the common law record.

The Petitioner's Trial

The prosecution's trial evidence established that on the morning of June 30, 1976, police officers responding to a radio broadcast entered a house on the south side of Chicago. On the first floor they found the bodies of Tyrone Thomas, his wife Virginia Thomas, and their 7-year-old daughter Michelle. (R. 905-907) The throats of Tyrone and little Michelle had been cut open; Virginia had been shot in the head. (R. 1054B-1054D) The infant daughter of Tyrone and Virginia Thomas was found unharmed on the floor next to her dead mother. (R. 909-910)

The prosecution's first witness at trial, Larry DePerry, testified that the victim Tyrone Thomas had been a drug dealer. At about 9:30 p.m. on June 29, 1976 DePerry went to the Thomas residence and spoke with Tyrone. DePerry then went to a nearby drugstore on an errand for Tyrone. As he was leaving, DePerry saw the petitioner, Walter Boyd, standing in front of the Thomas residence. DePerry returned to the Thomas residence just 5 minutes later. He found the dead bodies of Tyrone, Virginia, and Michelle Thomas. (R. 864-874)

The three victims were found covered with blood. (R. 912-915) Both Tyrone Thomas and his daughter Michelle had Type AB blood. Tyrone's wife Virginia had Type A blood. (R. 1058-1063) The petitioner has Type O blood. (R. 1056-1057) A pair of scissors found under Virginia's body contained Type AB blood, as did the two knives found on the floor near Tyrone's body. The petitioner's jacket, which was recovered about one block from the Thomas residence, contained Type O human blood on the collar, right sleeve, left panel, and back of the jacket. In addition, Type AB human blood was found on the left front panel, front left sleeve, and right sleeve of

the jacket. A carving knife found near the jacket also contained Type AB blood. Blood found outside of the Thomas residence on the porch was Type B blood. None of the victims had Type B blood. (R. 1064-1096)

A police officer testified that on July 7, 1976 the petitioner came to the police station, surrendered himself, was advised of his rights, and had a conversation with the police. (R. 1054G) Shortly thereafter the officer received a communication from another officer that one Oliver Holiday, "a witness to a triple slaying" who wanted to talk, was in custody in the Civic Center. Oliver Holiday was brought to Area 3 Headquarters in Chicago where the petitioner was being detained. (R. 1054H)

Homicide Investigator Richard Rochowicz testified at trial that at about 5:00 p.m. on July 7, 1976 he had a conversation with the petitioner at the Area 3 Police Headquarters. (R. 1100-1101) At that time the petitioner stated to Rochowicz that on the night of the crimes (June 29) the petitioner had gone to the Thomas residence to purchase narcotics; that as he gained entry to the home, two black men, strangers to him, ran up and pushed him into the residence; that the two strangers tied up Tyrone Thomas after pulling guns on Tyrone and the petitioner; that as one of the strangers tussled with Virginia Thomas, he dropped his gun and the petitioner picked it up; that one of the men, armed with a knife, started toward the petitioner; that the petitioner tried to shoot but the gun misfired; that the petitioner tussled with the stranger, grabbed for the knife, and was cut on the hand; and that the petitioner then fled from the house. (R. 1105-1106)

At about 6:00 that same evening Investigator Rochowicz had a private conversation with Oliver Holiday at

Area 3 Headquarters. After this conversation Rochowicz returned to the petitioner and talked to him again at about 6:20 p.m. (R. 1107-1108) Over defense counsel's objection, Rochowicz was permitted to testify at trial to the content of his second conversation with the petitioner, namely, what Oliver Holiday had told Rochowicz.

In a sidebar discussion out of the presence of the jury, the prosecution advised the trial judge that the hearsay objection interposed by the defense was inapplicable because the statement of Oliver Holiday was "not offered to prove the truth of the matter asserted therein. Quite clearly, our theory of the case is that [the Holiday statement] was a lie, that Oliver Holiday and the defendant participated in this brutal murder and this would go to show the state of mind of the defendant, and that is why we are offering it." (R. 1114) The defense's objection on hearsay grounds was overruled. (R. 1115)

Rochowicz testified in the jury's presence that during his second conversation with the petitioner, he told the petitioner about what Oliver Holiday had said. Holiday had stated to Rochowicz that the petitioner had come to Holiday's apartment on the night of the crimes. The petitioner had a shirt wrapped around his hand, and Holiday asked the petitioner what had happened. (R. 1119) The petitioner said he had killed two people and he had done something else he really did not want to do. Holiday advised the petitioner to get out of town. The petitioner told Holiday he would contact him later, and then he left Holiday's apartment. (R. 1115)

Rochowicz further testified that after he told the petitioner about the above conversation with Holiday, the petitioner said to him, "Okay, I'll tell you what really happened." The petitioner then related to Rochowicz that he, Holiday, and two other persons went to Tyrone's

house to "rip him off" (R. 1115-1116) He explained that this meant to rob Thomas. The petitioner and Holiday left their car; the other two persons stayed in the car. The petitioner and Holiday went to Tyrone's residence, gained entry, and began to talk with Tyrone. Holiday then struck Tyrone with a revolver and Tyrone fell to the floor. Virginia came into the room; Holiday grabbed her and took her out into the kitchen. A short time later Holiday returned and told the petitioner, "I have everything they have got. We can get." Then Virginia came in and attacked the petitioner with a knife. He grabbed the knife from her (a butcher knife), left the residence, and discarded his blood-soaked jacket nearby. The car containing the other two robbers pulled up; Holiday was also inside. The petitioner got into the car and the four proceeded to Oliver Holiday's apartment. There, Holiday gave the petitioner $100 and told him to get out of town until the matter cooled off. (R. 1115-1117)

After the prosecution rested, the petitioner, Walter Boyd, testified in his own behalf. He stated that two days before the crime, on June 27, 1976, he arranged a purchase of narcotics by Oliver Holiday from Tyrone Thomas. (R. 1192-1195) On June 29 Holiday advised the petitioner that the narcotics Holiday had purchased were not of good quality. The petitioner contacted Tyrone, who said he would supply fresh drugs or return Holiday's money. That evening Holiday and two other people came by and picked up the petitioner. The petitioner and Holiday left the car near the Thomas residence and walked toward the door. They passed Larry DePerry on the street, and the petitioner nodded to DePerry, whom he knew. (R. 1195-1199)

The petitioner rang the doorbell, and Tyrone opened the door. Then Oliver Holiday produced a gun and hit

Tyrone two or three times with it. Tyrone fell against the petitioner. Prior to that time the petitioner had no idea that Holiday had a gun and had never considered robbing Tyrone. Holiday told the petitioner to tie up Tyrone with the telephone cord. Holiday ordered Virginia to give him everything the Thomases had. Virginia left the room and returned, giving something to Holiday, who still had the gun in his hand and never let the petitioner out of his sight. Then Virginia wielded a knife at the petitioner. At that point the petitioner ran out of the house. When he reached the porch, he heard a gunshot. He ran away, discarded his jacket, removed his shirt, and wrapped it around his bleeding hand. (R. 1199-1208)

In rebuttal the prosecution called to the witness stand Assistant State's Attorney Gary Griffith. On July 7, 1976 Griffith had had a conversation with the petitioner at Area 3 Homicide Headquarters at about 7:00 p.m. The petitioner told Griffith that on the night of June 29, the petitioner, Oliver Holiday, and another went to the Thomas house to rob Tyrone. The petitioner and Holiday walked to Tyrone's door, and Holiday hid out of sight. When Tyrone opened the door to admit the petitioner, Holiday came out of hiding and struck Tyrone in the head. The petitioner and Holiday took Tyrone into the living room and tied him with a telephone cord. Holiday struck Tyrone again with a gun and then took Virginia Thomas to another room. When they returned, Virginia was bleeding from the top of her head. Virginia lunged at the petitioner with a butcher knife. The petitioner pulled it away from her and, in so doing, cut his fingers. At that point the petitioner became frightened, ran out the door, and heard one shot while running away. Later that evening he met Oliver Holiday and received his share of $100 from Holiday. Then the petitioner went to Miami. (R. 1469-1483, 1496-1497)

The petitioner was found guilty by the jury of the murders and attempted armed robberies of Tyrone, Virginia, and Michelle Thomas. (R. 1658) He appealed from his convictions and sentences to the Appellate Court of Illinois.

The Petitioner's Appeal

The Appellate Court of Illinois, First District, affirmed the petitioner's convictions and sentences in an opinion dated September 11, 1980. (The Opinion is set out in full in the petition for writ of certiorari, Appendix "A".) The Appellate Court ruled, *inter alia*, that the trial evidence was sufficient beyond a reasonable doubt to establish the petitioner's convictions. (Appendix "A" at 85-91) Noting that both Rochowicz and Griffith testified that the petitioner had admitted planning and participating in the attempted robbery of Tyrone Thomas, the Appellate Court held that these admissions by the petitioner were direct evidence of his guilt of attempted armed robbery and further established his accountability for the murders under the Illinois felony murder rule. (Appendix "A" at 85-89) The Appellate Court also noted the circumstantial evidence of the petitioner's guilt, including his admission that he was in the Thomas home on the night of the crimes, that his jacket and a knife found near the home were covered with type AB blood (the blood type of both Tyrone and Michelle), and that the petitioner fled to Florida after the crimes. (Appendix "A" at 89-90)

The Appellate Court also addressed the petitioner's contention on appeal that reversible error had occurred when the trial court allowed Investigator Rochowicz to testify about Oliver Holiday's statement. (Appendix "A" at 58-62) The Appellate Court concluded that the prej-

udicial impact of Holiday's out-of-court statement was insignificant compared to the petitioner's own admissions to Investigator Rochowicz and to Assistant State's Attorney Griffith, and that in light of the petitioner's admissions and other evidence of his guilt, any error that may have occurred from the admission of Holiday's statement was harmless. (Appendix "A" at 61)

Following the affirmance of his convictions by the Appellate Court, the petitioner sought leave to appeal to the Supreme Court of Illinois. On January 30, 1981 the Supreme Court of Illinois denied his petition for leave to appeal. (Appendix "B")

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM AT HIS TRIAL WHERE THE TESTIMONY OF A PROSECUTION WITNESS RELATING THE STATEMENT OF A CO-OFFENDER (WHO DIED BEFORE TRIAL) WAS ADMITTED ONLY TO SHOW THAT THE STATEMENT HAD BEEN MADE, WHERE THE JURY WAS AFFORDED A SATISFACTORY BASIS FOR EVALUATING THE TRUTH OF THE STATEMENT, AND WHERE THE PROSECUTION INFORMED THE JURY THAT THE STATEMENT WAS NOT TRUSTWORTHY.

The petitioner contends that his constitutional right to confront witnesses was violated by the introduction in evidence of a statement of a co-offender who was dead at the time of trial, and that that violation of his constitutional right was not harmless beyond a reasonable doubt.

The respondent asserts that no constitutional error arose from admission of Oliver Holiday's statement in evidence at trial. The statement was offered by the prosecution and admitted in evidence for one limited purpose: to show why defendant abandoned his original protestations of innocence to the police and admitted his participation in the crimes after being told of Holiday's statement to Rochowicz.

Throughout the petitioner's trial the prosecution's position was that Oliver Holiday was at the Thomas home with the petitioner on the night of the crimes and that Holiday participated in the murders and attempted armed robberies. (*See, e.g.*, R. 844-845, R. 848, R. 1546) Consequently, Holiday's statement to Rochowicz that he was at home when defendant allegedly came to him and confessed to the crimes, was a lie. It was presented to the jury as a lie; but it was presented to explain to the jury the course of events leading to the petitioner's admissions to Rochowicz and to Griffith that he had participated in the crimes. Consequently, Holiday was *not* a witness against the petitioner at his trial.

The crimes took place on June 29, 1976. (R. 905) The jury was advised that the co-offender, Oliver Holiday, died shortly after the crimes and prior to the date (July 29, 1976) that the case was presented to the Cook County Grand Jury which indicted the petitioner. (R. C18, R. 1348, R. 1586) The jury also knew that a second offender, someone with Type B blood, was present with the petitioner in the Thomas home on the night of the crimes. It was the prosecution's contention that Oliver Holiday was that individual and that, therefore, Holiday's statement to Rochowicz about Holiday coming to his house and telling him about killing people was a fabrication. The only reason the Holiday statement was introduced at trial was to explain the petitioner's state

of mind at the time of his admission to Rochowicz. (R. 1114)

The petitioner's reliance on this Court's opinion in *Bruton v. United States*, 391 U.S. 123 (1968) is totally misplaced. That case involved the introduction at a defendant's trial of the confession of a co-defendant inculpating the defendant of the crime; the prosecution's intent in that case was to establish the defendant's guilt through the confession. In the case at bar, however, the prosecution introduced Holiday's statement only to explain why the petitioner readily gave a voluntary admission of guilt after being confronted with Holiday's statement. The prosecution carefully made it clear to the jury, however, that Holiday's statement was not trustworthy. Holiday, then, was not a witness against the petitioner.

In *Dutton v. Evans*, 400 U.S. 74, at 88 (1970) this Court ruled:

> Evans was not deprived of the right of confrontation on the issue of whether Williams actually made the statement related by Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements.

In the instant case the prosecution was not attempting to tell the jury that Holiday's statement incriminating the petitioner was truthful. Rather, the prosecution's theory was that the statement was a lie. The issue here then becomes, whether the jury was afforded a satisfactory basis for evaluating the truth of the prior statement. *California v. Green*, 399 U.S. 149, at 161 (1970). The respondent contends that the jury at the petitioner's

trial was afforded such a basis, in that the prosecution represented to the jury that Holiday's statement was not reliable or trustworthy. Oliver Holiday was never portrayed as a witness against the petitioner. The admission in evidence of Holiday's statement to Rochowicz was for the limited purpose of showing only that the statement was made and that it had a certain effect on the petitioner. There is no Confrontation Clause issue in this case.

II.

ANY VIOLATION OF THE PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM RESULTING FROM ADMISSION AT TRIAL OF HOLIDAY'S STATEMENT WAS TOTALLY HARMLESS WHERE THE PETITIONER ADMITTED PARTICIPATING IN THE ATTEMPTED ARMED ROBBERIES, WHERE THAT ADMISSION WAS TANTAMOUNT TO AN ADMISSION TO MURDER UNDER THE ILLINOIS FELONY-MURDER RULE, AND WHERE OTHER PROPERLY ADMITTED EVIDENCE ALSO ESTABLISHED HIS GUILT BEYOND ANY REASONABLE DOUBT.

The respondent contends that the petitioner's constitutional right to confront witnesses against him was not abridged in this case. Assuming for sake of argument that a violation of his right to confront witnesses did occur, however, any such error was harmless beyond all reasonable doubt.

The most damaging evidence against the petitioner was the fact that he admitted both to Investigator Rochowicz and to Assistant State's Attorney Griffith that he and Holiday went to the home of the victims to rob them and that the petitioner did in fact participate in the attempted armed robbery. Under Illinois law this admission was tantamount to a confession to murder under the Illinois felony-murder rule. Ill. Rev. Stat.

1975, ch. 38, pars. 9-1(a)(3), 5-2(b) and 5-2(c); *People v. Smith*, 56 Ill. 2d 328, 307 N.E.2d 353 (1974). (See Appendix "A" at 85-88) This Court noted in *Parker v. Randolph*, 442 U.S. 62, at 73 (1979):

> The right protected by Bruton—the "constitutional right of cross-examination," * * * has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence.

There was also other evidence, circumstantial but strong, of the petitioner's guilt. This included the fact that the petitioner was seen at the scene of the crimes by Larry DePerry immediately after DePerry saw Tyrone alive and healthy and only minutes before DePerry discovered the bodies of the three victims. It also included the fact that the relatively rare Type AB blood found on various parts of the petitioner's jacket was the same blood type as that of Tyrone and Michelle Thomas. Additionally, there is the evidence that the petitioner fled from Chicago immediately after the crimes and went to Florida. When this evidence is coupled with that of the petitioner's admissions to Rochowicz and Griffith, it cannot be said that the jury's verdicts would have differed had the jury not heard the content of Holiday's statement to Rochowicz.

The instant case is analogous to *Harrington v. California*, 395 U.S. 250 (1969) and *Schneble v. Florida*, 405 U.S. 427 (1972). In each of those cases any violation of *Bruton v. United States*, which may have occurred as a result of admission in evidence of the statements of co-defendants was harmless, in light of other evidence that was properly admitted.

The content of Oliver Holiday's statement to Rochowicz was not crucial or devastating to the defense in the instant case, particularly when weighed against the evi-

dence of the petitioner's guilt. *See Dutton v. Evans*, 400 U.S. 74, at 87 (1970). And although the petitioner was unable to cross-examine Oliver Holiday, who had died within weeks of the crimes, the petitioner was permitted at trial to testify at length to conversations he had had with Holiday on the day of the crimes (R. 1195-1196, 1198-1206), as well as to conversations he had with Holiday two days before the crimes (R. 1195) and later when the petitioner called Holiday from Florida after the crimes (R. 1212-1213).

In light of the overwhelming evidence of the petitioner's guilt and the relatively small impact that the Holiday statement could have had on the jury (especially where the jury was afforded a basis for concluding that Holiday's statement was untrustworthy), any error resulting from the admission in evidence of Holiday's statement was harmless and could not have affected the jury's verdicts.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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